

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Revocation of the
Adult Foster Care License of Zoila
Perra

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above matter came on for hearing before the undersigned Administrative Law Judge on November 22, 2011. The hearing record closed at the conclusion of the hearing the same day.

Brian J. Asleson, Chief Deputy, Wright County Attorney, appeared on behalf of Wright County Human Services (the County) and the Minnesota Department of Human Services (the Department).

Zoila Perra (the Licensee) appeared on her own behalf of and without counsel.

STATEMENT OF THE ISSUES

1. Did the Licensee fail to comply with the terms of the conditional license issued pursuant to the Commissioner's Order of November 6, 2008?
2. Should the Licensee's adult foster care license be revoked?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Licensee has had many years of experience working with adults with disabilities. In February 2008, the Licensee applied for a license to provide adult foster care in her home. At that time, her son Fernando was living with the Licensee. Fernando's background study revealed one juvenile and one adult criminal offense. Consequently, he was disqualified from direct contact with persons served by Department programs.¹

2. By the time the disqualification was issued, Fernando was living in St. Cloud, Minnesota, where he attended college. He requested reconsideration of the disqualification, but the Department denied it on May 1, 2008. Fernando appealed the

¹ Ex. 1, Findings of Fact ¶¶ 1-4.

denial. Fernando, who was a member of the Army National Guard, was deployed to Iraq in June 2008. A hearing on Fernando's appeal took place on July 9, 2008. Fernando did not know about the hearing because he was absent in Iraq.²

3. The Commissioner meanwhile denied the Licensee's application based on Fernando's disqualification.³ Following an appeal of the license denial, the Commissioner rescinded the denial and ordered that the Licensee be issued a conditional license. The conditions set forth in the Commissioner's November 6, 2008, Order included the following:

- Fernando would have no contact with foster care clients and not be present in the home when foster care clients were there.
- The Licensee would comply with all laws and rules governing adult foster care.
- The Licensee would advise the County of Fernando's residence and of the date of any leave or discharge of Fernando from the military.⁴

4. On May 4, 2009, the Licensee called the County to inform them that Fernando would be returning from Iraq in May 2009. The Licensee did not tell the County where Fernando would live upon his return.⁵

5. Fernando thereafter returned from Iraq and spent two and one-half weeks of reintegration at a Wisconsin army base. He then moved into an apartment in Brooklyn Center, Minnesota, where he remained for a little more than two years. He attended school in the Twin Cities during that time.⁶

6. In 2011, Fernando began work for a corporate adult foster care entity. The Department proceeded to conduct a background study on Fernando in connection with this work. In providing the Department with background information, Fernando had used the Licensee's address as his own, although he was not then living with the Licensee. He regards that address as his permanent address, and the Licensee views her home as Fernando's, even though Fernando does not live there.⁷

7. The Department informed the County about the address issue. On April 22, 2011, Lisa Gertken, a social worker for the County, made a home visit to investigate who was living in the Licensee's home. Fernando, but not the Licensee, was at the home when Ms. Gertken called. He was welcoming and agreed to show Ms. Gertken around the home. Fernando showed Ms. Gertken two bedrooms in the home that Fernando described as those of himself and his brother Israel. Ms. Gertken understood from the conversation that Fernando was living in the home,⁸ although he was not. His

² *Id.* ¶ 7; Ex. 4; Testimony (Test.) of Fernando Perra.

³ *Id.* ¶ 9.

⁴ Ex. 2.

⁵ Test. of Nesa Black.

⁶ Test. of F. Perra.

⁷ Ex. 4; Test. of F. Perra; Test. of the Licensee.

⁸ Test. of L. Gertken.

home is in Buffalo, Minnesota, but at a different address than that of his mother.⁹ Ms. Gertken also understood that Fernando's brother Israel was living in the home one week a month.¹⁰ Israel is away at college, but he does come home from time to time. At the time of the original licensure, the Department had conducted a background study on Israel and cleared him.¹¹

8. Following the home visit, the County requested revocation of the Licensee's adult foster care license. The County based the request on its belief that the Licensee had violated the terms of the conditional license by failing to inform the County that Fernando was living in the home. The County also based its request on the Licensee's failure to inform the County that a second son, Israel, was living in the home.¹²

9. On September 19, 2011, the Department issued an Order of Revocation.¹³ From that order, the Licensee appealed, resulting in the hearing herein.

10. Although she was first licensed for adult foster care in 2008, the Licensee has never had an adult foster care client in her home.¹⁴

11. Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Human Services and the Office of Administrative Hearings have jurisdiction to consider this matter.¹⁵

2. The Department gave proper and timely notice of the hearing and complied with all procedural requirements of law and rule.

3. Pursuant to Minn. Stat. § 245A.07, subd. 3, a license may be revoked if a license holder fails to fully comply with applicable laws or rules, or if the license holder or someone living in the license holder's home has a disqualification that has not been set aside.

4. When applying a sanction under Minn. Stat. § 245A.07, the commissioner is to consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program.

5. At a hearing regarding a licensing sanction, the commissioner must demonstrate reasonable cause for the action taken. If the commissioner demonstrates

⁹ Test. of F. Perra.

¹⁰ Test. of Marian Elkerton.

¹¹ Test. of L. Gertken.

¹² Ex. 4.

¹³ Ex. 5.

¹⁴ Test. of the Licensee

¹⁵ Minn. Stat. §§ 245A.07, subd. 3; 14.50.

that reasonable cause existed, the burden of proof shifts to the license holder to demonstrate by a preponderance of the evidence that the license holder was in full compliance with the laws or rules that the commissioner alleges were violated.¹⁶

6. The Department has not demonstrated reasonable cause to believe that the license holder may have a disqualified individual living in the licensed residence.

7. The Licensee has demonstrated, by a preponderance of the evidence, that her son Fernando was not living in the residence and was not present when adult foster care was taking place.

8. The Licensee has demonstrated, by a preponderance of the evidence, that her son Israel was not living in the residence.

9. The Department has demonstrated reasonable cause to believe that the license holder may have violated one of the conditions of her license in that the Licensee failed to advise the County of Fernando's addresses when he returned from Iraq.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge recommends that the Order of Revocation be **RESCINDED**.

Dated: December 20, 2011

s/Linda F. Close

LINDA F. CLOSE

Administrative Law Judge

Reported: Digitally Recorded

¹⁶ Minn. Stat. § 245A.08, subd. 3.

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. The parties have 10 calendar days after receiving this report to file Exceptions to the report. At the end of the exceptions period, the record will close. The Commissioner then has 90 days to issue his final decision. Parties should contact Lucinda Jesson, Commissioner of Human Services Lucinda Jesson, P.O. Box 64998, St. Paul, MN 55164-0998, (651) 431-2907, to learn the procedure for filing exceptions or presenting argument.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

At hearing, the County Attorney correctly noted that any violation here consists of the Licensee's not following the terms of her conditional license "to a tee."¹⁷ The Licensee complied with the requirement to notify the County of Fernando's return from military service in Iraq. The Licensee complied with the requirement to bar any contact between adult foster care clients and Fernando. The Licensee complied with the requirement to ensure that Fernando was not present in the home when adult foster care clients were present. What she did not do was to notify the County of Fernando's address. That oversight seems insignificant in light of all the facts of this case.

Importantly, the Department's position rests on its determination that Fernando is a disqualified individual. This position is troubling, given that Fernando appealed the Department's denial of reconsideration of the disqualification, and the Department held a hearing on that appeal at a time when Fernando was serving his country in Iraq. It appears that this error will be rectified, and a hearing will be held on the 2008 disqualification.¹⁸ Fernando testified at his mother's hearing, and he is a credible individual. It remains to be seen whether the Department's foundation for the conditional license and subsequent revocation holds up when Fernando finally receives the hearing to which he is entitled.

The addition of Israel's presence in the home as a reason to recommend revocation represents another leg of the County's foundation. This addition is curious. The County had conducted a background study of Israel at the time of the original license application. Israel had been cleared in that study. Israel does not live in the

¹⁷ Closing argument on behalf of the County.

¹⁸ Apparently, because of the 2008 disqualification, Fernando was again disqualified in 2011 when he underwent a background study to work in a corporate facility. The hearing on the 2011 disqualification is supposed to be combined with that of the 2008 disqualification. Test. of F. Perra; Test. of the Licensee.

home. He is in college now, and he does periodically return to the Licensee's home, where he still has a bedroom. Technically, the Licensee should probably have included his name at the time of renewing her license. But that technical violation surely does not support revocation.

Added to these facts is the Commissioner's own view, expressed in the order of conditional license, that the Licensee is highly qualified to provide adult foster care.¹⁹ At the time of her licensure, the Licensee had had a decade and a half of experience caring for adults with disabilities, including 15 years as a senior program director at a corporate foster care agency. She also had had experience working for a social service agency and operating foster homes for the mentally ill.²⁰ Her background leaves no doubt that the Licensee is able to provide experienced care to individuals with special needs.

The County's account of the home visit raises some questions, no doubt. But the visit appears to have been cursory, and the questions raised were never probed at the time of the visit, when any miscommunication might have been cleared up. For example, the social worker did not follow up on Fernando's statement that he had been home for a month and one-half. Did he mean that he had returned to live in Buffalo at his mother's house or did he mean he was living at some other location in Buffalo, his hometown? In the context of other of Fernando's statements at hearing, the ALJ took this statement to mean that he had moved back to his hometown of Buffalo. The County appears to have interpreted other comments to support its licensing recommendation to revoke. But these comments were not explored sufficiently to persuade the ALJ that Fernando was living in the Licensee's home, and that the Licensee was violating the rules.

The final irony of this revocation case is, of course, that the Licensee, during the entire three years she has been licensed, has never had an adult foster care client in her home. The Licensee has thus never violated the crucial license condition that Fernando has no contact with adult foster care clients. The only real violation is the Licensee's failure to inform the County of Fernando's address. This violation is not significant enough to justify a sanction of revocation.

Given all the circumstances of this case, the ALJ recommends the order of revocation be rescinded.

L. F. C.

¹⁹ Ex. 2.

²⁰ Ex. 1, Findings of Fact ¶ 1.